

# THE ROLE OF ASSESSMENTS IN MUNICIPAL FISCAL POLICY IN OHIO

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The purpose of this article is to consider the proposed use of assessments by municipalities in Ohio for the improvement, construction and extension of facilities and services and the relationship of their use in connection with the overall fiscal policy of the municipality concerned.

Fiscal policy can only be determined after a study of the basic needs of the municipality. It is based upon the current operating requirements plus the anticipated requirements if expanded growth is expected, for current operations, and the requirements for expansion of services and facilities such as water, sewer, streets and sidewalks, to enumerate a few, in conjunction with the growth. In addition, as a part of this policy, consideration must be given to capital improvements that may be necessary. These should be included in the plans so that when policies are established, consideration will have been given to all of the municipal needs that can reasonably be anticipated in light of the present conditions and trends.

Certainly one of the major problems of all urban areas is the burgeoning population that creates problems of adequate healthful living accommodations, adequate supplies of water, and adequate facilities to handle sewage disposal without contaminating the living area. In addition, the problem of roads, streets, freeways and expressways add to the complexity of the problems of even the moderate sized community. Not so many years ago, this same area upon which these municipalities stand was inhabited by Indian tribes, who, when their village had remained at one point long enough to foul up the area, would move to another point, sufficiently distant to let nature take care of their former site. This we can no longer do.

As a part of the formulation of plans preceding the adoption of a fiscal policy, attention must be given to the overall costs of the anticipated requirements on a year to year basis, as well as on a long term basis, to determine what funds may be available to the municipal corporation for its activities. Special attention must be paid to the direct debt limitation<sup>1</sup> and the indirect debt limitation,<sup>2</sup> the first of which exempts special assessment bonds,<sup>3</sup> and the latter of which in-

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<sup>1</sup> Ohio Rev. Code § 133.03 (1959).

<sup>2</sup> Ohio Const. art. XII, § 2 (1912).

<sup>3</sup> Ohio Rev. Code § 133.02 (1959).

volves and limits all unvoted bonds,<sup>4</sup> and the provisions of article XII, section 11 of the Ohio Constitution which provides that no bonded indebtedness shall be incurred or renewed unless provision is made in the legislation providing for such debt for the levy and collection of annual taxes sufficient to pay the interest on the debt and to create a sinking fund for its final redemption at maturity.

Special attention must also be paid to any other requirements that can reasonably be anticipated and which may require the municipality to exercise its power to borrow money in order to accomplish such projects. These could interfere with other projects, unless closely correlated. The various other means of financing major projects, both within and without the constitutional debt limitations, must also be considered to determine the most feasible plan in establishing the municipality's fiscal policy. An example of this would be the decision to issue mortgage revenue bonds for the construction of off-street parking facilities, rather than to use non-voted general obligation bonds even if they were available within the debt limitation. This is now allowed under the theory that the debt created thereby is not a "debt" in the technical sense of the constitutional provision and is not subject to the limitations of article XII, section 2, of the Ohio Constitution.<sup>5</sup>

By these means, the full borrowing power of the municipality can be wisely used in the establishment of a fiscal policy to meet its needs.

Consideration must also be given to the use of voted levies for specific purposes to further conserve the power to borrow within the debt limitations imposed. These will usually meet with general public approval if the plan is wisely prepared and effectively presented.

After consideration of the overall requirements, the assessment policy can then be fitted into the overall fiscal policy of the municipality. The nature of assessments and their limitation must be examined to see when they can best be used in the implementation of the fiscal policy, both before and after its adoption.

An assessment has been defined as "a special and local charge levied upon property especially benefited by a public improvement for the purpose of paying a portion of the cost of such improvement."<sup>6</sup>

The present principal enabling statute is Ohio Revised Code section 727.01, which attempts to enumerate the various public improvements for which assessments may be levied against benefited property. However, such enumeration has been held to be directory

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<sup>4</sup> State *ex rel.* Portsmouth v. Kountz, 129 Ohio St. 272, 194 N.E. 869 (1935).

<sup>5</sup> State *ex rel.* Gordon v. Rhodes, 156 Ohio St. 81, 100 N.E.2d 225 (1951).

<sup>6</sup> The law governing municipal corporations in Ohio, Ch. 5, § 5.5 (10th ed. 1955).

only and not restrictive.<sup>7</sup> Even so, the State Legislature does have the power under article XIII, section 6 of the Ohio Constitution, to prohibit municipalities from levying assessments for certain public improvements in order to prevent the abuse of the municipal power of assessment.<sup>8</sup> However, in view of the *Weiler* case,<sup>9</sup> there seems to be no limitation upon the power of municipalities to assess for proper municipal improvements. The procedural aspects involved will be discussed later.

Special assessments are peculiarly adapted to certain specific types of improvements easily understood by the public. They also provide an important means by which the municipality can assist its citizens in the development of specific areas of the city with improvements at the request of the owners of the property in the area and at the principal expense of the owner in the area,<sup>10</sup> and in instances where the petitions requesting the improvements are properly presented and acted upon, at the total expense of the property owners benefited.<sup>11</sup> This gives to the municipal corporation a means of control to be worked into its fiscal policy with regard to the amount of the debt limitation that can, each year, be allocated to special assessment projects. The extent to which the municipality may participate in underwriting the costs of such improvements should be carefully spelled out and faithfully adhered to so that its citizens will have confidence in its treatment of them on specific projects.

By these means, areas of the city not developed by subdivision planners or realtors who come under the provisions of subdivision regulations, can be developed by the property owners through co-operation with the municipality and by adhering to the program devised for the purpose of placing them on equal footing with the types of subdivisions mentioned above. One important point in this policy is that these means can result in a net savings to the property owners through lower interest rates and spread payments while some of the other necessary costs may be higher.

The use of assessments today is especially adapted to communities of small and moderate size, which are constantly faced with the pressure of expansion through the annexation of contiguous territory that is usually partially developed and which, as a rule, has none of the basic services normally provided by the municipality. In many cases, special assessments are the only answer for the property owners and the municipality in view of the strain upon municipal finances as a

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<sup>7</sup> *State ex rel. Toledo v. Weiler*, 101 Ohio St. 123, 128 N.E. 88 (1920).

<sup>8</sup> *Berry v. Columbus*, 104 Ohio St. 607, 136 N.E. 824 (1922).

<sup>9</sup> *Supra* note 7.

<sup>10</sup> Ohio Rev. Code § 727.16, Municipality's share of cost.

<sup>11</sup> Ohio Rev. Code § 727.30.

result of inflation, expansion, and limitation of the taxing and borrowing powers.

We can conclude then, that the fiscal policy of a municipality can specify an area or areas in which special assessment proceedings will be used to implement the growth of the city without placing an undue additional burden upon the entire population. While this can be one of the principal reasons for its inclusion in the fiscal policy, it is by no means a limitation upon the many ways in which assessments may be used for proper municipal improvements.

Because of the expansion and growth of municipalities, more attention has been directed to the use of special assessments in recent years. The 101st General Assembly amended the debt limitation provisions of the Uniform Bond Law by increasing them from one to one and one-half percent for non-voted obligations for non-charter municipalities, when the charter provides for the levying of taxes outside the ten mill limitation without a vote of the people. In the same amendment, it also increased the net indebtedness limitation from five percent to seven and one-half percent,<sup>12</sup> thereby giving additional borrowing power to municipalities as long as they can do it within the ten mill limitation on their annual borrowing.

This brings up the additional consideration that assessments have been exempted from the provisions of Ohio Revised Code section 133.02. Assessments must follow the procedure established by the General Assembly unless the charter sets up an entirely different proceeding for the levying and collection of assessments. Even then they are subject to the same limitations as non-charter cities, or charter cities who use the statutory proceedings to levy and collect assessments.<sup>13</sup>

In order to determine the proper role of assessments in the fiscal policy, the limitations and conflicts within the statutes authorizing assessments and providing for the payments and the enforcement of the lien have to be closely examined so that each project that is considered will carry its own weight within the overall policy, and not become a burden by means of a contrary judicial determination or through error on the part of the officials of the city attempting to levy for an improvement. In implementing article XIII, section 6, Ohio Constitution, the Legislature has enacted Ohio Revised Code section 727.15 limiting the assessments first to the "benefits conferred";<sup>14</sup> secondly, limiting the total assessments in any five year period to thirty-three and one-third percent of the "actual" value of the prop-

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<sup>12</sup> Ohio Rev. Code § 133.03, effective Sept. 10, 1959 (Page Supp. 1959).

<sup>13</sup> *Supra* note 4.

<sup>14</sup> *Norwood v. Baker*, 172 U.S. 269 (1898).

erty assessed after the improvement;<sup>15</sup> and third, limiting the assessments for a main sewer to the sum, which, in the opinion of the legislative authority, would be required to construct an ordinary sewer. The thirty-three and one-third percent limitation which once applied to the "tax valuation," has been amended and now applies to the "actual" or fair market value after the improvement or improvements. There is a conflict in the limitation in Ohio Revised Code section 729.06, which is in the sidewalk assessment chapter, and which places an overall limitation of thirty-three percent of the "land value" of the property, for all assessments. I am not aware of any case where this conflict has arisen and been resolved. Certainly it points up a need for re-examination of the assessment statutes.

There is also a series of limitations on the assessments against unimproved or unsubdivided land,<sup>16</sup> and failure to follow the requirements of this section will invalidate the assessment.<sup>17</sup>

With these built-in limitations upon assessments, the question immediately arises as to what to do if any portion of an assessment is declared invalid under these limitations. Formerly, the load was shifted to the general fund of the municipality and became a general obligation of all the taxpayers. The Ohio Supreme Court, in reviewing this problem, held that the use of mandamus to enjoin the spreading of assessments upon the tax list was improper, and that each individual case was entitled to its day in court to determine the validity or invalidity of assessments.<sup>18</sup> This reasoning was applied further in an unreported case where an injunction was sought after the council had determined that portions of an assessment project were assessed in violation of Ohio Revised Code section 727.15, and re-assessed the remaining properties in the project to cover the additional costs under the provisions of Ohio Revised Code section 727.64. The Ohio Court of Appeals of the Fourth District, following the reasoning of the *Donsante* case, held that the re-assessment was proper as long as it did not exceed the statutory limitations on the properties assessed.<sup>19</sup>

These limitations, in addition to the limitations of special benefits, must be closely scrutinized in each project so that no one assessment will operate to disrupt a well planned fiscal policy. While the determination of special benefits is generally left to the discretion of the municipal council, the courts will examine the results to see if there has been an abuse of discretion.<sup>20</sup>

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<sup>15</sup> Findlay v. Frey, 51 Ohio St. 390, 38 N.E. 114 (1894).

<sup>16</sup> Ohio Rev. Code § 727.02.

<sup>17</sup> Griswold v. Pelton, 34 Ohio St. 482 (1878).

<sup>18</sup> State *ex rel.* Donsante v. Pethel, 158 Ohio St. 35, 106 N.E.2d 626 (1952).

<sup>19</sup> Booher v. City of Chillicothe, unreported (Ohio Ct. App. 1958).

<sup>20</sup> Cincinnati v. Board of Ed., 63 Ohio App. 549, 27 N.E.2d 413 (1940).

After an examination of the proposed projects is favorably concluded and the project or projects included in the city's plans for improvement, each of the procedural steps involved must be cautiously studied and carefully taken so as to bear the scrutiny of the courts. The requirements for notice to the property owners must be fully met as required by Ohio Revised Code section 727.14. The adequacy or inadequacy of notice as required by the statute has been recently examined by the United States Supreme Court on the question of due process, even though the Florida statute setting up the requirements of notice was fully complied with by the municipality levying the assessment.<sup>21</sup>

As Ohio Revised Code section 727.14 was amended in 1959, it provides for the service of notice by registered mail, rather than in the usual manner of service upon non-residents. The service and return of notice upon the property owners must be carefully examined to be certain that these provisions are fully met.

Another of the limitations to be considered when appropriation proceedings are necessary in order to conduct the project, is that imposed by article XVIII, section 11, Ohio Constitution, limiting the assessments levied to fifty percent of the cost of the appropriations. The balance of the cost of the appropriation must be borne by the municipal corporation, and would be of extreme importance in any fiscal policy.

There are corrective provisions for many defects that appear in assessment proceedings,<sup>22</sup> but these are all subject to the limitations herein discussed.

Special attention has been given to the assessment chapters and the Uniform Bond Law in recent legislation of the General Assembly in order to enable municipal corporations to make broader use of assessment proceedings without continually being badgered by injunctive proceedings and nuisance suits. The General Assembly, recognizing the problems involved in the use of assessments by municipalities, attempted to ease the requirements of notice by amending Ohio Revised Code section 727.14; and to permit the joining of a series of small projects into one large project by the amendment of Ohio Revised Code section 727.11 and specifically directed that:

Proceedings with respect to improvements shall be literally construed by the legislative authorities of municipal corporations and by the courts in order to secure a speedy completion of the work at reasonable cost, and the speedy collection of the assessment after the time has elapsed for its payment. Merely formal objections shall be disregarded, but the proceedings shall be strictly construed in

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<sup>21</sup> *Ganger v. Miami*, 358 U.S. 804 (1958).

<sup>22</sup> Ohio Rev. Code §§ 727.57, 727.58, 727.67 and 727.68.

favor of the owner of the property assessed or injured as to the limitations on assessment of private property and compensation for damages sustained.

With respect to any assessment upon the abutting, adjacent, and contiguous, or other specially benefited lots or lands in a municipal corporation for any part of the cost connected with an improvement authorized by law, the passage by the legislative authority of an ordinance levying such assessment shall be construed a declaration by such legislative authority that the improvement for which it is levied is conducive to the public health, convenience, and welfare. No such assessment shall be held invalid by any court because of the omission of the legislative authority to expressly declare in the proceedings and legislation for such improvement and assessment that the improvement is conducive to the public health, convenience, or welfare.<sup>23</sup>

I set this out in full with the comment that if the courts can be persuaded to apply this statute to most of the assessment cases, the vexing problem of irregularities that continually arise would be, for the most part, solved.

The amendments to the Uniform Bond Law permitting notes with maturities of up to five years when used in anticipation of the collection of assessments,<sup>24</sup> have had the effect of removing the pressure engendered by the former limitation (two years) and permits the inclusion of several projects in one bond issue, thereby reducing the overall expense involved in issuing the bonds, and also giving the municipalities more time to perfect their proceedings. Experience has indicated that interest rates for notes may be proportionately less than the interest rates for bonds, but this is somewhat speculative. Where there are sufficient payments after completion, the use of notes certainly reduces the size of the bond issue involved, and may, in some instances, permit alternate methods of financing in the event that the municipality has the means. But again, in any fiscal policy, this would have to be studied in light of the debt limitations.

It must always be kept in mind that the amount of assessment valuation available as unvoted obligations is subject to the same debt limitation as other non-voted obligations under article XII, section 2, Ohio Constitution. However, payments of these assessments will reduce the millage required to service them. Ohio Revised Code section 727.10 limits assessment maturities to twenty years, and provides that they may be payable in one to twenty years. At first glance, this would appear adequate but the Uniform Bond Law provides maximum maturities of forty years for bonds issued for water works

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<sup>23</sup> Ohio Rev. Code § 727.68.

<sup>24</sup> Ohio Rev. Code § 133.31, effective Sept. 16, 1957 (Page Supp. 1957).

improvements, and twenty-five years for sanitary and storm sewers.<sup>25</sup>

It could be argued that the assessment laws could be extended for the full maturity of these bonds, but the overall benefit is questionable when the increased costs in interest and administration are considered.

This discussion would be incomplete without an enumeration of the types of assessments available for use. They are: (1) by a percentage of the tax value of the property assessed; (2) in proportion to the benefits which may result from the improvement; and (3) by the front foot of the property bounding and abutting upon the improvement.<sup>26</sup> Each of the foregoing methods has certain advantages and disadvantages inherent in its use, and the three methods available may be commingled.<sup>27</sup> The choice of the method to be used lies within the sound discretion of the assessing authorities.<sup>28</sup>

When the project under consideration is being done on petition of three-fourths in interest of the property owners, the method requested in the petition should be followed in order that no question can arise as to the uniformity of the assessment or the limitations on the assessment.<sup>29</sup>

The method of using a percentage of the tax valuation of the property has obvious disadvantages. Where the properties involved are not properly assessed for taxation, a determination of what the proper assessed valuation should be can introduce inequalities into the proceedings. This then, violates the rule as to uniformity and in case of such a violation, the proceedings are nullified.

This method has not been used to the extent of the other two methods because, at one time, it was interpreted to mean that the lots had to be valued "according to its true value in money."<sup>30</sup> However, this phrase has been construed as having no application to assessments.<sup>31</sup> This question was resolved in a conservancy district case, however, and not in an assessment proceedings under the municipal code.

The second proposed method available is "in proportion to the benefits which may result from the improvement." Originally, this was difficult to use since the courts were inclined to interpose their

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<sup>25</sup> Ohio Rev. Code § 133.20 (AA) (C).

<sup>26</sup> Ohio Rev. Code § 727.01.

<sup>27</sup> *Akron v. Allen*, 22 Bull. 260 (Ohio, 1901).

<sup>28</sup> *Northern Indiana R.R. v. Connelly*, 10 Ohio St. 159 (1859).

<sup>29</sup> *Roose v. Boyle*, 53 Ohio L. Abs. 502, 85 N.E.2d 803 (Ct. App. 1949); *Mock v. Boyle*, 53 Ohio L. Abs. 567, 86 N.E.2d 475 (Ct. App. 1949); Ohio Const. art. XII, § 2 (1933).

<sup>30</sup> *Ibid.*

<sup>31</sup> *Miami Conservancy Dist. v. Ryan*, 104 Ohio St. 79, 135 N.E. 282 (1922).



judgment for that of the council as to special benefits. Since then, the courts have changed and presently hold that due process forbids the court to usurp the function of the legislative or tax levying body.<sup>32</sup> This makes it possible for the council to proceed with the determination of special benefits, and to then provide for the apportionment of those special benefits among the affected property owners. While this has long been the most feasible method of assessing for sanitary and storm drainage districts, it is now recognized as the most acceptable method of assessment for almost all purposes. For one thing, the problem of irregular lots and corner lots which raise the question of gross inequalities and have been troublesome for many years can best be disposed of by the "benefit"<sup>33</sup> method. This method also has provision for an assessing board to report on the estimated assessment of such lots and lands as are specially benefited by the improvement<sup>34</sup> and gives the property owners an opportunity to object and have an "equalizing board" appointed<sup>35</sup> which reports to the council after hearing and investigating the complaints. The council can then confirm either the work of the assessing board or the equalizing board, but a two-thirds vote is required to approve the report of the equalizing board. In the event such a report is not approved, the council can appoint successive equalizing boards until an acceptable report is obtained.<sup>36</sup> The effect of these provisions has been to keep assessment quarrels out of the courts, and to keep the expenses of the assessment within the benefited district. No similar provision is made for assessments levied on either the "foot front" method or by the "tax valuation" method since the rule of uniformity of assessments would bar its use. On one occasion, a board of freeholders was appointed to advise the council on property values after an assessment on a "foot front" basis had been made, and a complaint filed under the provisions of Ohio Revised Code section 727.15. This was upheld by the court of appeals and the question of "commingling" of methods of assessment was discussed but not passed upon.<sup>37</sup> Certainly it is better to keep the question of the final levying of the assessments in the hands of council until all of the objections are disposed of rather than levy the assessment, only to have the courts enjoin its collection long after the work is done, the debt incurred, and the credit of the municipality pledged. It is easy to see that a series of injunctive proceedings would seriously

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<sup>32</sup> *Cincinnati v. Board of Ed.*, 68 Ohio App. 549, 27 N.E.2d 413 (1940).

<sup>33</sup> *Youngstown v. Fishel*, 89 Ohio St. 247, 104 N.E. 141 (1914); *Haviland v. Columbus*, 50 Ohio St. 471, 34 N.E. 679 (1893).

<sup>34</sup> Ohio Rev. Code § 727.44.

<sup>35</sup> Ohio Rev. Code § 727.45.

<sup>36</sup> Ohio Rev. Code § 727.46.

<sup>37</sup> *Supra* note 19.

impair the ability of a municipality to use assessment proceedings as a part of its fiscal policy.

The last method available is the "foot front" method of assessment and has probably been more widely used than either of the other two methods. First of all, it lends itself well to areas of the city that are laid out with uniform lots, of equal or similar width and depth, and is easily understood by the property owners being assessed. From the time that the plans, specifications and estimates are presented to the council, these owners can make a fairly accurate estimate of their assessment, and the city can also make an accurate estimate of its share of the project. Certainly, where assessments are levied on petition of the property owners, this has been the most widely used method. But it has its deterrents, too. With the advent of modern subdivisions, irregular shaped lots are the rule, rather than the exception, and the foot front method does not apply as well in such instances as the benefit method, even though more easily understood. The latest determination of the Ohio Supreme Court on corner lots<sup>38</sup> assessed under the foot front rule also has certain built-in inequalities that are exceedingly harsh on owners of corner lots, and seem hard to justify. The courts have held, fairly uniformly, that the use of the foot front rule is justified under the doctrine of presumed or theoretical benefits when there appears to be an inequality in the application of the foot front method, on the grounds that substantial justice had been done.<sup>39</sup> But there is also a more recent line of decisions holding that the levying of an assessment in excess of the special benefits conferred is, to the extent of such excess, an unlawful taking of private property for public use in violation of article I, section 19, Ohio Constitution, and the provisions of the Fourteenth Amendment to the Constitution of the United States.<sup>40</sup> This line of authorities seems the better reasoned and presents an additional problem to be overcome in the use of the foot front method, namely, the question whether a part of the assessed provisions may be assessed in excess of the special benefits conferred.<sup>41</sup>

Accordingly, I must conclude that in most projects the special benefits method is recommended in order to spare the municipality unnecessary expense that may arise from the limitations imposed on the other two methods, especially when being used in connection with long range fiscal planning. On the other hand, when it is impossible

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<sup>38</sup> *Supra* note 33.

<sup>39</sup> *Supra* note 28.

<sup>40</sup> *Supra* note 14; *Seifert v. Terrace Park*, 10 Ohio App. 114 (1918).

<sup>41</sup> *Lasky v. Helton*, 91 Ohio App. 136, 48 Ohio Ops. 272 (1951), *appeal dismissed*, 158 Ohio St. 42 (1952).

to have petitions presented for the required improvements, the foot front method could then be utilized.

In order that the municipality take full advantage of special assessment provisions when adopting its fiscal policy, the long range planning may, by policy determination of the council, select, first, those projects which shall be exclusively done by special assessment, with the municipality bearing none of the cost, or two percent of the cost plus intersections; secondly, those projects which may be done in part by special assessment and in part by other means, such as general obligation bonds, revenues, or voted levies; third, those projects which shall be done exclusively by revenue or voted levies; and finally, those to be done exclusively by voted issues. As the planning proceeds from year to year thereafter, the special assessments programmed can be adapted to the policy requirements and the changing needs of the municipality, and have the effect of placing the burden upon those who are directly or "specially" benefited. This type of financing will be more easily understood, and will lighten the general tax load when properly used; and for certain types of improvements, will induce the owners of property desirous of improvements to seek and use this method, thereby adding to the overall progress by improving specific areas at what is chiefly their own expense.